No. 95-227

In The

Supreme Court of the United States

OCTOBER 1995, TERM

ALLIANCE FOR COMMUNITY MEDIA, ALLIANCE FOR COMMUNICATIONS DEMOCRACY, PEOPLE FOR THE AMERICAN WAY, NEW YORK CITIZENS FOR RESPONSIBLE MEDIA, MEDIA ACCESS NEW YORK, BROOKLYN PRODUCERS' GROUP, and DAVID CHANNON,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR NEW YORK CITY PETITIONERS

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SUMMARY OF ARGUMENT

The Government's argument that the public forum doctrine is triggered only when speakers seek access to government property is utterly unpersuasive. It virtually ignores at least six decisions in which the Court has recognized that private

property dedicated to public use may attain public forum status, citing instead a dissent in one and dictum in another of the Court's decisions.

The two private shopping center cases on which the Government heavily relies are inapposite since neither involved private property dedicated *by government* to public use. By contrast, when California's constitution afforded a right to petition in the common areas of private shopping centers, the Court assumed that public fora had been created on private property. The Government also completely ignores the private ownership of most public streets - - places to which the public forum doctrine clearly applies and which are indisputably regarded as public fora.

While insisting that public access channels are private property, the Government completely ignores the compelling analogy between dedication of cable channels for public access and dedication of private lands for public streets and parks, a process which, at the very least, creates public easements and often transfers fee title from private parties to the public. Moreover, contrary to the *in banc* court's observation, on which the Government heavily relies, public access channels are generally managed *not by cable operators* but rather by non-profit entities generically called community access organizations.

ARGUMENT

We demonstrated in our opening brief that the *in banc* court erred in holding that public access channels were not public fora. *Alliance for Community Media v. FCC*, 56 F.3d 105, 121-23 (D.C. Cir. 1995). More specifically, we showed that

the *in banc* court erroneously held that public forum analysis is only triggered when speakers seek access to government property (the major premise), NYC Pet. Br. at 15-19, and that public access channels are purely private property (the minor premise). NYC Pet. Br. at 11-15. Neither the Government nor its supporters have demonstrated either the major or minor premise of the *in banc* court's holding to be sound.

I. STATE ACTION IS PRESENT BECAUSE PUBLIC ACCESS CHANNELS ARE PUBLIC FORA.

A. THE PUBLIC FORUM DOCTRINE APPLIES WHEN GOVERNMENT DEDICATES PRIVATE PROPERTY TO PUBLIC USE.

The Government asserts that the public forum doctrine only concerns the right to engage in expressive activity on government property, relying on the dissent in one of the Court's decisions and dictum in another. Govt. Br. at 22, quoting *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting), and citing *Internat'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2707 (1992). But the Court in *Cornelius* expressly stated that public forum analysis is also triggered when speakers seek access to "private property dedicated to public use." 473 U.S. at 801. To be sure, no supporting case law was cited. Govt. Br. at 22 n.9. There are, however, at least six decisions (besides *Cornelius*) in which the Court has recognized that private property dedicated to public use may attain public forum status. NYC Pet. Br. at 15-17. The Government virtually ignores this case law, except to concede

that one of these decisions provides support for the Court's statement in *Cornelius*. Govt. Br. at 23 n.9. Given the precedents, Justice Blackmun's dissent in *Cornelius* and the dictum in *Lee* do not accurately reflect the scope of the public forum doctrine.

The Government's reliance on *Hudgens v. NLRB*, 424 U.S. 507 (1976) and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (Govt. Br. at 23 n.9) is likewise misplaced, since neither case involved private property that had been dedicated *by government* to public use. By contrast, when California's constitution afforded a right to petition in common areas of private shopping centers, this Court assumed that those places had become public fora by virtue of the government dedication of private property to public use. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (shopping center owner may still restrict expressive activities by adopting time, place and manner regulations that minimize interference with commercial functions); *id.* at 103 (Powell, J., concurring) ("I do not interpret the decision as a blanket approval for state efforts to transform privately owned commercial property into public forums").[1]

While insisting that public forum analysis is inapplicable to private property, the Government completely ignores the private ownership of most public streets — places to which

[1] Contrary to Time Warner Cable's suggestion (TWC Br. at 27 n.32), Justice Powell's concurring statement implies that some state efforts will transform private property into public fora, most notably, California's dedication of common areas in private shopping centers in that state for expressive activities.

the public forum doctrine clearly applies. NYC Pet. Br. at 18-19. Time Warner Cable attempts to explain away that fact, arguing that abutting landowners never voluntarily assume the fee title in public streets. TWC Br. at 27 n. 33. The very authority cited by Time Warner Cable, however, implies the exact opposite, since fee title in adjoining public streets provides abutting landowners "an efficient weapon for the protection of their own and the public interest against an unwarranted appropriation of the street in the proper maintenance of which the location of their property gives them a peculiar interest." 10A E. McQuillin, *Law of Municipal Corporations* § 30.32, at 281 (3d ed. rev. 1986).[2]

The Government vainly attempts to distinguish public access channels from "genuine public forums" such as parks and streets, observing that such channels are set aside for "public" programming. Govt. Br. at 23. This fact, however, merely confirms that public access channels belong in the same category as these other genuine public fora, which are "held in trust for the use of the public." *Hague v. CIO*, 307 U.S. 496, 515 (1939).[3]

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[2] Nor is there any support for Time Warner Cable's other irrelevant assertion that public ownership preceded private ownership of public streets. TWC Br. at 27 n.33. Indeed, when private land is dedicated for public streets during the subdivision development process, private ownership necessarily precedes creation of a public easement or transfer of fee title to the public. NYC Pet. Br. at 12-13.

[3] The Government inexplicably lumps together public, educational and governmental access channels. Govt. Br. at 23. But New York City Petitioners only argue that public access channels are public fora. The reservation of cable channels for educational and governmental

The Government also errs in suggesting that access channels are more aptly described as a species of common carrier regulation rather than public fora. Govt. Br. at 23. That is simply not so. Whereas access channels were created to promote free speech over the cable medium, H.R. Rep. No. 934, 98th Cong., 2d Sess. 30-31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667-68, common carrier regulation developed to address economic concerns with "no reference to the First Amendment." I. Pool, *Technologies of Freedom* 98 (1983). The Government completely ignores this fundamental difference between the two regulatory regimes. Time Warner Cable, however, perhaps unwittingly attests to the difference, noting that access channels cannot be described as a species of common carrier obligations since the 1984 and 1992 Cable Acts authorize and require access channels, 47 U.S.C. §§ 531, 532, but prohibit common carrier regulation of cable service. 47 U.S.C. § 541(c). TWC Br. at 26.

B. PUBLIC ACCESS CHANNELS ARE PUBLIC PROPERTY.

The Government also asserts that access channels are "plainly private property," quoting the *in banc* court's observation that access channels "belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." *Alliance for Community Media*, 56 F.3d at 122. Govt. Br. at 22. To the contrary, public access channels are plainly public property, since they have been dedicated to

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programming is thus irrelevant to the case.

public use by franchise agreements. The Government completely ignores the compelling analogy between dedication of cable channels for public access and dedication of private lands for public streets and parks, a process which, at the very least, creates public easements and often transfers fee title from private parties to the public. NYC Pet. Br. at 11-14. By the same token, the dedication of cable channels for public access, at the very least, creates public easements and perhaps even transfers fee title in those channels.

Moreover, contrary to the *in banc* court's observation, public access channels are generally managed *not by cable operators* but rather by non-profit entities generically called community access organizations. J.A. 19, 155, 162, 172, 235, 240, 311. Indeed, in the State of New York, public access channels are only managed by cable operators as a last resort if franchising authorities have otherwise failed to designate entities to manage such channels.[4] Nor is it wholly true that public access channels are among the products for which cable operators collect fees from subscribers, since public access channels must be included in basic cable service — the entry level and lowest priced tier — and cannot be placed on higher priced tiers or sold to subscribers at an additional "a la carte" fee. 47 U.S.C. § 543(b)(7)(A).[5]

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[4] "The public access channel shall be operated and administered by the entity designated by the municipality or, until such designation is made, by the cable television franchisee; provided, however, that the municipality may designate such entity at any time throughout the term of a franchise by a resolution duly adopted by the legislative body thereof." N.Y. Comp. Code R. & Regs. tit. 9, § 595.4(c)(1).

[5] Because New York City Petitioners primarily include public access producers, we have primarily focused on the public forum status of public access channels. There is, however, a compelling argument that leased access channels are also public fora. Contrary to the Government's assertion (Govt. Br. at 23), the mere fact that cable operators charge programmers fees to use leased access channels does not preclude public forum status for these channels. Even though the City of Chattanooga presumably charged fees to lease its theaters, the Court did not hesitate to declare those theaters "public forums designed for and dedicated to expressive activities." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 549 n. 4, 551 n. 6, 555 (1975). Public streets likewise do not lose their status as public fora merely because municipalities may assess reasonable permit fees in connection with valid permit schemes for marches, parades and rallies in those places. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941); *see also Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992).

Time Warner Cable strenuously argues that leased access channels cannot be deemed public fora. TWC Br. at 25-27. Like the Government's argument, Time Warner Cable's argument rests on the premise that public forum analysis solely applies to government property. That premise is, of course, utterly false. NYC Pet. Br. at 15-19. Time Warner Cable also suggests that leased access channels cannot be deemed public property because cable systems were built by cable operators on the supposed expectation that they would editorially control all channels — an expectation only disrupted by passage of the Cable Communications Policy Act of 1984. Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act"). There was, however, never any such expectation, since most franchise agreements have typically required public access channels and often mandated leased access channels. *See, e.g., New York Citizens Committee on Cable TV v. Manhattan Cable TV Inc.*, 651 F. Supp. 802, 815 (S.D.N.Y. 1986) (leased access obligations imposed on Manhattan cable operator, owned by Time Inc., since mid-1970's, long before passage of 1984 Cable Act). Finally, contrary to Time Warner Cable's assertion (TWC Br. at 26), cable operators are indeed "mere conduits" of programming on leased access channels, since they are largely barred

CONCLUSION

The judgment of the Court of Appeals should be reversed, and Section 10 and its implementing regulations should be struck down as violative of the First Amendment.

Respectfully submitted,

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from exercise of editorial control over such channels. 47 U.S.C. § 532(c)(2).